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IN THE
Supreme Court of the United States

SUSAN S. HARJO, ET AL.,
Petitioners,

v.

PRO-FOOTBALL, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF PSYCHOLOGY PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae[2] are renowned researchers in the social sciences, in particular in the fields of stereotyping, prejudice, and discrimination. Their areas of expertise include the cognitive operations underlying the development and proliferation of these phenomena, as well as the resulting individual and collective harms caused by stereotypes, prejudice, and discrimination. Their scholarship has contributed significantly to our understanding of racial and ethnic slurs, and the public and private impacts caused by such slurs. Particular applications of this scholarship focus on contemporary representations of American Indians in popular culture and the influence that such representations have on American Indians, non-Indians, and intergroup dynamics. *Amici curiae* seek to demonstrate to the Court the compelling public interests implicated by the application of the doctrine of laches to a petition to cancel the Redskins trademark.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that no counsel for a party authored this brief in whole or in part and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2(a), counsel for *amici* represent that all parties were provided notice of *amici*'s intention to file this brief at least 10 days before its due date. Counsel for *amici* also represent that all parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

[2] Biographical statements for *amici curiae* are set forth in the Appendix to this brief.

SUMMARY OF ARGUMENT

A petition to cancel a disparaging trademark may be filed "at any time" under Section 14 of the Lanham Act to protect the public's strong interest in removing disparaging trademarks from the registry. The equitable defense of laches is unavailable to private parties when its application would frustrate an important public interest. The public has a compelling interest in the cancellation of disparaging trademarks – such as the Redskins mark – that embody invidious racial and ethnic slurs. Such slurs have profound and lasting negative impacts on American Indians and non-Indians alike. These negative impacts, and the corresponding public interest in the cancellation petition, are magnified by the pervasive exposure of the public to the offensive Redskins mark. Accordingly, the defense of laches should not be available to Pro-Football, Inc. in its attempt to protect its trademark from a Section 14 challenge.

ARGUMENT

This case presents the Court with an ideal opportunity to clarify the important role that considerations of the public interest play in actions to cancel trademark registrations under the Lanham Act. Section 14(3) of the Lanham Act states that a petition to cancel the registration of a trademark may be filed "at any time" if that trademark was registered in violation of Section 2(a) of the Act. 15 U.S.C. § 1064(3). Section 2(a) of the Lanham Act prohibits the registration of marks that "[c]onsist[] of or comprise[] . . . matter which may disparage . . . persons, living or dead, . . . or bring them into contempt, or disrepute." *Id.* § 1052(a). The court below upheld the dismissal of petitioners' cancellation action under the doctrine of laches, notwithstanding the plain language of the

Lanham Act and in spite of the overriding public interest in the cancellation of a trademark that demeans and disparages a vulnerable racial and ethnic minority group.

Amici submit this brief to provide the Court with the most recent scholarly evidence[3] of the extensive and pervasive public harm caused by the continued use of American Indian mascots in professional sports. This evidence establishes a powerful public interest in cancellation of the trademark, which should inform the interpretation of Section 14 and trump any private interests that the doctrine of laches might otherwise protect. Furthermore, the pervasive public exposure that such mascots receive in the context of professional football makes this an important case, and an ideal vehicle, for making clear the important role that the public interest plays in the laches analysis.

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[3] This Court has a long history of relying on such information. *See, e.g., Brown v. Board of Educ.*, 347 U.S. 483, 494–95 (1954) (relying on social science research to demonstrate the harm caused by segregated schools); *see also Gratz v. Bollinger*, 529 U.S. 244, 299–300 (2003) (Ginsburg, J., dissenting) (looking to social science studies to illuminate the effect of discrimination on minority job and housing applicants); *Ballew v. Georgia*, 435 U.S. 223, 239 (1978) (holding that studies in the field of social psychology "lead [the Court] to conclude that the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members"); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 428 (1968) (noting presence of comprehensive studies stressing prevalence of private hostility toward minorities and the need to protect these targeted groups from resulting discrimination in housing sales).

I. THE PLAIN MEANING OF SECTION 14(3) OF THE LANHAM ACT REFLECTS THE PROFOUND PUBLIC INTEREST IN CANCELLING THE REGISTRATION OF DISPARAGING TRADEMARKS

Sections 2(a) and 14(3) of the Lanham Act allow a petition to cancel the registration of a trademark on the ground that it "may disparage . . . persons" to be filed "at any time." 15 U.S.C. §§ 1052(a), 1064(3). The Third Circuit recognized that these provisions mean what they say, precluding the application of a statute of limitations or the equitable doctrine of laches to cancellation petitions filed under Section 14(3). Such petitions, the Third Circuit held, can literally be filed "at any time." *See Marshak v. Treadwell*, 240 F.3d 184, 193-94 (3d Cir. 2001) (Alito, J.).

As the Third Circuit noted, "[t]he reason for this rule is quite simple – the interest vindicated by Section 14 is not just the injury to the challenging party, but the integrity of the register." *Marshak*, 240 F.3d at 194 (citing *Harjo v. Pro Football, Inc.*, 30 U.S.P.Q.2d 1828, 1831 (T.T.A.B. 1994)). The Trademark Trial and Appeal Board has long agreed, refusing to apply equitable defenses to cancellation petitions filed under Section 14(3). *See, e.g., Harjo*, 30 U.S.P.Q.2d at 1831 ("[T]he equitable defenses of laches and estoppel are not available against claims of fraud and abandonment because there exists a broader interest – a 'public policy' interest – in addition to a private interest in removing from the register those registrations procured or maintained by fraud and those registrations for marks that have been abandoned."); *TBC Corp. v. Grand Prix Ltd.*, 12 U.S.P.Q.2d 1311, 1313 (T.T.A.B. 1989) ("Where the proposed ground for cancellation is abandonment,

equitable defenses should be unavailable for the same reason they have been held unavailable when the ground asserted is descriptiveness or fraud. 'It is in the public interest to remove abandoned registrations from the register."). Just as the public interest is best served by removing abandoned, confusing, and fraudulently obtained trademarks from the registry "at any time," so too is the public entitled to protection from disparaging trademarks whenever the offensive character of the trademark can be proven.

II. THE EQUITABLE DEFENSE OF LACHES IS UNAVAILABLE WHEN ITS APPLICATION IS INCONSISTENT WITH THE PUBLIC INTEREST

Even if laches were available despite the plain text of the statute, the public interest can override that defense. In general, equity will not aid a private party in contravention of the public interest. Thus, sovereign governments are not barred by laches when they act in pursuit of the public interest, regardless of the cause or length of the delay. *See United States v. Beebe*, 127 U.S. 338, 344 (1888) ("The principle that the United States are not bound by any statute of limitations, nor barred by any laches of their officers, however gross, in a suit brought by them as a sovereign Government to enforce a public right, or to assert a public interest, is established past all controversy or doubt."); *see also United States v. Summerlin*, 310 U.S. 414, 416 (1940); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917).

Similarly, the defense of laches is unavailable in suits involving private parties when its application is inconsistent with public interests that lie beyond

the private concerns advanced by the parties. *See, e.g., Internet Specialties West, Inc. v. Milon-Digiorgio Enters.*, 559 F.3d 985, 993 n.5 (9th Cir. 2009) ("The likelihood of confusion to consumers is the critical factor in our consideration of both laches and the breadth of the injunction. The public has an interest in avoiding confusion between two companies' products. Even if a defendant can show unreasonable delay and prejudice, laches will not apply to bar a suit if the public has an overriding interest in having the suit proceed."); *Jarrow Formula, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 840 (9th Cir. 2002) ("[L]aches will not apply if the public has a strong interest in having the suit proceed."); *Marshak*, 240 F.3d at 192–93; *Conopco, Inc. v. Campbell Soup Co.*, 95 F.3d 187, 193 (2d Cir. 1996) ("[T]he public good is of paramount importance when considering the equitable defense of laches."); *Portland Audobon Soc'y v. Lujan*, 884 F.2d 1233, 1241 (9th Cir. 1989) ("We have repeatedly cautioned against application of the equitable doctrine of laches to public interest environmental litigation."); *Maryland-National Capital Park & Planting Comm'n v. U.S. Postal Serv.*, 487 F.2d 1029, 1042 (D.C. Cir. 1973) ("Equitable remedies depend not only on a determination of legal rights and wrongs, but on such matters as laches, good (or bad) faith, and most important an appraisal of the public interest.").

III. THE PUBLIC HAS A STRONG AND DEMONSTRABLE INTEREST IN THE CANCELLATION OF THE REDSKINS TRADEMARK

Laches should not be available to bar this petition for cancellation of the Redskins trademark because application of the laches doctrine would be inconsis-

tent with the public interest. The public interest in avoiding racial and ethnic stereotypes cannot be overstated. *See Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630–31 (1991) ("If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury."); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) ("[C]lassifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."). Race-based stereotypes and ethnic slurs are particularly pernicious, as they can come to symbolize all the inaccurate stereotypic beliefs associated with a group categorized and simplified under one label. *See* Jeff Greenberg, S. L. Kirkland & Tom Pyszczynski, *Some Theoretical Notions and Preliminary Research Concerning Derogatory Ethnic Labels, in Discourse and Discrimination* 74, 77 (Geneva Smitherman-Donaldson & Teun A. van Dijk eds., 1988) ("Greenberg, *Some Theoretical Notions and Preliminary Research Concerning Derogatory Ethnic Labels*"); *see also Miller-El v. Dretke*, 545 U.S. 231, 268 (2005) (Breyer, J., concurring) ("subtle forms of bias are automatic, unconscious and unintentional and escape notice, even of those enacting the bias") (internal quotation marks, citations omitted); *Batson v. Kentucky*, 476 U.S. 79, 88 (1986) (a state may not "tak[e] any action based on crude, inaccurate racial stereotypes").

By prohibiting disparaging marks, the Lanham Act recognizes that this interest is heightened when racial stereotyping lays claim to federal protection.

And it is at its zenith when the racial epithets target a minority group, such as American Indians, that warrants heightened solicitude from the federal government. *See Rice v. Cayetano*, 528 U.S. 495, 529–30 (2000) (Stevens, J., dissenting) ("Throughout our Nation's History, this Court has recognized both the plenary power of Congress over the affairs of Native Americans and the fiduciary character of the special federal relationship with descendants of those once sovereign peoples.") (citations omitted); *see also Carpenter v. Shaw*, 280 U.S. 363, 367 (1930).

The public interest in avoiding racial and ethnic stereotypes is directly implicated here. Social science research shows that the use of ethnic slurs like "redskin" perpetuates harmful stereotypes and leads to discrimination. Moreover, research shows that the effects of American Indian sports mascots are particularly harmful.

A. Racial And Ethnic Slurs Cause And Perpetuate Inaccurate And Harmful Stereotypes

Stereotypes are mental links or associations between a social category and a limited set of behaviors or traits. *See generally* John A. Bargh et al., *Generality of the Automatic Attitude Activation Effect*, 62 J. Personality & Soc. Psychol. 893 (1992); Ap Dijksterhuis & Ad van Knippenberg, *On the Parameters of Associative Strength Central Tendency and Variability as Determinants of Stereotype Accessibility*, 25 Personality & Soc. Psychol. Bull. 529 (1999); Frank R. Fazio et al., *On the Automatic Activation of Attitudes*, 50 J. Personality & Soc. Psychol. 229 (1986); Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 Psychol. Rev. 4 (1995); Anthony G.

Greenwald, Mark R. Klinger & Thomas J. Liu, *Unconscious Processing of Dichoptically Masked Words*, 17 Memory & Cognition 35 (1989). They are the little pictures in our heads, gleaned from societal images and social communications, that provide a brief description of what a group of people is like. As such, stereotypes persist because they provide heuristic shortcuts for forming impressions of others. *See generally* Irene V. Blair & Mahzarin R. Banaji, *Automatic and Controlled Processes in Stereotype Priming*, 70 J. Personality & Soc. Psychol. 1142 (1996); Paul G. Davies et al., *Consuming Images: How Television Commercials That Elicit Stereotype Threat Can Restrain Women Academically and Professionally*, 28 Personality & Soc. Psychol. Bull. 1615 (2002); Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 59 J. Personality & Soc. Psychol. 5 (1989) ("Devine, *Stereotypes and Prejudice*"); C. Neil Macrae et al., *On the Activation of Social Stereotypes: The Moderating Role of Processing Objectives*, 33 J. Experimental Soc. Psychol. 471 (1997). In fact, stereotypes persist even among people who have positive conscious beliefs about individuals of other races and ethnicities, because they may harbor a variety of unconscious, negative stereotypic beliefs. *See generally* Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 Eur. Rev. Soc. Psychol. 36 (2007). Such stereotyping is automatic, often operating independently of conscious perception and behavior. Research on associative processes demonstrates that unconscious stereotyping is widespread and that it is difficult for even well-intentioned people to control the use of negative stereotypes once they acquire them. *See* Devine, *Stereotypes and Prejudice*, *supra*; *see also* Mahzarin R. Banaji

& Anthony G. Greenwald, *Implicit Stereotyping and Prejudice, in The Psychology of Prejudice: The Ontario Symposium* 55, 60 (Mark P. Zanna & J. M. Olson eds., 1994) (citing a study where participants rated behaviors performed by black subjects as representing greater aggression than the same behaviors performed by white subjects); P. Goldberg, *Are Women Prejudiced Against Women?*, 5 Transaction 28–30 (1968) (reporting a study in which female subjects under-rated the quality of essays attributed to female-named rather than male-named authors where the only clue as to gender was the fictional author's name on the paper).

All stereotypes (including those considered "positive" such as black athleticism) are harmful because they set limiting and prescriptive expectations for group members. However, stereotypes that are negative and simplistic may have more invidious effects than positive or more complex stereotypes. Negative, simplistic stereotypes are often expressed as ethnic or racial slurs. Ethnic and racial slurs are a form of "ethnophaulism." The term ethnophaulism is derived from the Greek and means, literally, "to disparage a national group." Brian Mullen et al., *Complexity and Valence in Ethnophaulisms and Exclusion of Ethnic Out-Groups: What Puts the "Hate" Into Hate Speech?*, 96 J. Personality & Soc. Psychol. 170, 170 (2009) ("Mullen, *Complexity and Valence in Ethnophaulisms*"). Ethnophaulisms have two components. The first component is valence, indicating the negativity of the cognitive representation being used for the ethnic group. The second component is the degree of complexity, indicating the type of cognitive representation being used for the ethnic group. *See id.* at 171. Ethnic and racial slurs have

extremely negative valence and low complexity. *See* Erdman B. Palmore, *Ethnophaulisms and Ethnocentrism*, 67 Am. J. Soc. 442, 444 (1962) ("The derivations of most ethnophaulisms express some unfavorable stereotype."); Abraham Aaron Roback, *A Dictionary of International Slurs* (1944). Common examples of racial or ethnic slurs are "chink," "darkie," and "redskin." It is little wonder that social scientists have concluded that ethnic slurs "probably constitute the most direct and effective expression of prejudice in everyday discourse." Mullen, *Complexity and Valence in Ethnophaulisms*, 96 J. Personality & Soc. Psychol. at 171 (quoting Greenberg, *Some Theoretical Notions and Preliminary Research Concerning Derogatory Ethnic Labels* at 75).

The intentional or unintentional act of using ethnic slurs conveys hatred and hostility toward the target group. *See* Mullen, *Complexity and Valence in Ethnophaulisms*, 96 J. Personality & Soc. Psychol. at 170. For example, one commonly used indicator that a crime was hate-motivated is whether the perpetrator used derogatory slurs to insult the perceived social group of the victim while committing the crime. *See* Donald A. Saucier, Jericho M. Hockett & Andrew S. Wallenberg, *Impact of Racial Slurs and Racism on the Perceptions and Punishment of Violent Crime*, 23 J. Interpers. Violence 685, 687 (2008).

The negative effects of ethnic slurs on the target population are invidious. For example, ethnic immigrant groups that were referred to by ethnic slurs that "were more simplified and more negative were less likely to marry native-born Americans; more likely to participate in ethnic fraternal associations; more likely to be segregated into ethnic neighborhoods; more likely to be deemed suitable for hazard-

ous work; less likely to become naturalized citizens; and more likely to be subjected to harsher immigration quota restrictions, . . . [and] were more likely to be portrayed to children in negative ways." Mullen, *Complexity and Valence in Ethnophaulisms*, 96 J. Personality & Soc. Psychol. at 172. Ethnic immigrant groups referred to with racial or ethnic slurs have been found to have higher suicide rates than other immigrant groups. *See* Brian Mullen & Joshua M. Smyth, *Immigrant Suicide Rates as a Function of Ethnophaulisms: Hate Speech Predicts Death*, 66 Psychosomatic Med. 343, 343 (2004).

These effects on the targeted group, like the effects of discrimination, can be particularly pernicious among smaller ethnic groups, as there is a significant tendency for smaller groups to be referred to with simpler and more negative slurs. *See id.* at 344.

B. Racial Stereotypes And Ethnic Slurs Foster Prejudice And Discrimination

A long history of social psychological research demonstrates that stereotyping and prejudice lead to discrimination. *See* Brief for American Psychol. Ass'n as Amicus Curiae, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (No. 87-1167), *reprinted in* 46 Am. Psychologist 1061, 1063 (1991).

Stereotypes set expectations for the characteristics and abilities of group members, resulting in both limited expectations of what such individuals can do and negative reactions (*i.e.*, disparagement or punishment) to individuals who violate these expectations. *See* Diana Burgess & Eugene Borgida, *Who Women Are, Who Women Should Be: Descriptive and Prescriptive Gender Stereotyping in Sex Discrimination*, 5 Psychol., Pub. Pol'y & L. 665, 665 (1999); Madeline E. Heilman, *Description and Prescription:*

How Gender Stereotypes Prevent Women's Ascent up the Organizational Ladder, 57 J. Soc. Issues 657, 657 (2001) ("Heilman, *Description and Prescription*"). As a result, stereotypes lead to biased interpersonal judgment as group members are interpreted and reacted to in light of the stereotypes. *See* Heilman, *Description and Prescription*, 57 J. Soc. Issues at 657–74; Laura A. Rudman & Eugene Borgida, *The Afterglow of Construct Accessibility: The Behavioral Consequences of Priming Men to View Women as Sexual Objects*, 31 J. Experimental Soc. Psychol. 493–517 (1995); Denise Sekaquaptewa et al., *Stereotypic Explanatory Bias: Implicit Stereotyping as a Predictor of Discrimination*, 39 J. Experimental Psychol. 75–82 (2003). Even subtle or unintended stereotyping of ethnic minorities and women has been shown to have negative behavioral consequences. The research demonstrates that stereotyping, even when subtle and unintended, can lead to negative biases in how individuals view and interact with members of stereotyped groups. *See generally* John F. Dovidio et al., *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 J. Experimental Soc. Psychol. 510 (1997).

Racial stereotypes are particularly prevalent in athletics, where they contribute to biased judgments about individuals. For example, one study had participants listen to a radio broadcast of a basketball game and focus on evaluating the performance of one player. *See* Jeff Stone, Zachary W. Perry & John M. Darley, *"White Men Can't Jump": Evidence for the Perceptual Confirmation of Racial Stereotypes Following a Basketball Game*, 19 Basic & Applied Soc. Psychol. 291, 295 (1997). Some participants were led to believe the target player was a back male, and

some were led to believe the player was a white male. Even though all participants listened to the same player's performance, post-game ratings showed that, when they thought that the target player was black, he was perceived to show high athletic ability and to be a better basketball player, but to show low intelligence and effort during the game. However, when they thought he was white, the player was perceived as having low athletic ability and poor basketball skill, but as smarter and to have shown more effort during the game. *See id.* Other studies confirm this effect. *See generally* C.A. Tuggle & Anne Owen, *A Descriptive Analysis of NBC's Coverage of the Centennial Olympics: The "Games of the Woman"?*, 23 J. Sport & Soc. Issues 171 (1999); Jennifer L. Knight & Traci A. Guiliano, *He's a Laker; She's a "Looker": The Consequences of Gender-Stereotypical Portrayals of Male and Female Athletes by the Print Media*, 45 Sex Roles 217 (2001); M. Biernat & T. K. Vescio, *She Swings, She Hits, She's Great, She's Benched: Implications of Gender-Based Shifting Standards for Judgment and Behavior*, 28 Personality & Soc. Psychol. Bull. 66 (2002).

C. American Indian Sports Mascots Are A Particularly Harmful Type Of Invidious Racial And Ethnic Slur

The research regarding the negative effects of rational and ethnic stereotypes makes clear that American Indian sports mascots such as the Redskins impose harmful psychological costs on American Indians in general and on American Indian children and young adults in particular. Studies demonstrate that American Indian sports mascots: (1) perpetuate a narrow and false public perception of American Indian culture and identity, thereby diminishing and

degrading such identity; (2) diminish the self-esteem of American Indian individuals; and (3) correspondingly enhance the self-esteem of European Americans, at the expense of American Indians.

1. American Indian sports mascots are disparaging to American Indians because they perpetuate inaccurate and negative stereotypes

The perpetuation of inaccurate and negative stereotypes is inherently demeaning to members of minority groups.[4] *See generally* Stephanie A. Fryberg et al., *Of Warrior Chiefs and Indian Princesses: The Psychological Consequences of American Indian Mascots*, 30 Basic & Applied Soc. Psychol. 208, 209 (2008) ("Fryberg, *Of Warrior Chiefs and Indian Princesses*"). But the adverse effects of such stereotypes are exacerbated when they are applied to groups that are vastly underrepresented in the general population, because the stereotype is more accessible to most citizens than an accurate, individualized representation of members of the stereotyped group. *See* Stephanie A. Fryberg & Sarah S. M. Townsend, *The Psychology of Invisibility, in Commemorating* Brown: *The Social Psychology of Racism and Discrimination* 173, 173 (Glenn Adams ed., 2008) ("Fryberg, *The Psychology of Invisibility*").

American Indians are such an underrepresented group. They comprise only 1.5% of the population

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[4] Indeed, studies indicate that American Indian mascots are harmful to American Indians even when they are generally perceived to be "honorary" representations of American Indians. *See generally* Stephanie A. Fryberg, *Really? You don't look like an American Indian: Social Representations and Social Group Identities* (Dec. 2002) (unpublished Ph.D. dissertation, Stanford University) (on file with author).

of the United States. *See* Stella U. Ogunwol, *The American Indian and Alaska Native Population: 2000*, Census 2000 Brief (2002), *available at* http://www.census.gov/prod/2002pubs/c2kbr01-15.pdf. Furthermore, they tend to be geographically segregated from the general U.S. population. *See* Stephanie A. Fryberg & Alisha Watts, *We're Honoring You Dude: Myths, Mascots and American Indians, in Doing Race: 21 Essays for the 21st Century* 7 (Hazel Rose Markus ed., forthcoming 2010) ("Fryberg, *We're Honoring You Dude*") (noting that 40% of American Indians live on reservations). Moreover, this tiny population is underrepresented in the popular media. For example, one analysis of two weeks of television programming in 2002 revealed that American Indians were represented in that forum only 0.4% of the time. *See id.* at 8. "[T]he relative invisibility of American Indians in mainstream media gives inordinate communicative power to the few prevalent representations of American Indians in media." Fryberg, *Of Warrior Chiefs and Indian Princesses*, 30 Basic & Applied Soc. Psychol. at 208.

On the other hand, the American population is pervasively exposed to American Indians as sports mascots. *See* Fryberg, *The Psychology of Invisibility* at 180. American Indian sports mascots are particularly problematic because "[g]iven the small quantity of social representations for [American Indians] . . . the available representations become even more powerful because they may be the only representations to which some members of society are exposed." *Id.* at 178. Thus, American Indian sports mascots play a predominant role in influencing the general public's perception of American Indian identity and do so in such a way as to distort and misinform. *See* Fryberg,

We're Honoring You Dude at 10 ("When people repeatedly see American Indians portrayed as mascots, they form automatic associations, or stereotypes, between American Indians and the common characteristics of American Indian mascots (e.g., aggressive, noble, violent, stoic, savage-like, spiritual).").

2. American Indian sports mascots are disparaging because they lower the self-esteem of American Indian children and young adults

American Indian sports mascots adversely affect the psychological well-being of American Indian individuals. Recent studies suggest that "the psychological consequences of [American Indian sports mascots] are more complex than would be implied by a straightforward application on the [existing] stereotyping literature." Fryberg, *Of Warrior Chiefs and Indian Princesses*, 30 Basic & Applied Soc. Psychol. at 214.

These studies show that exposure to American Indian sports mascots depress the self-esteem and feelings of community worth and limit the aspirations of American Indian high school and college students. *See id.* These adverse effects were found even when the mascot was not identified as "negative" by the affected individual.[5] *Id.* at 212. Interestingly, even those images with which the students had *positive*

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[5] In addition to gauging how the American Indian mascot imagery affects the students' self-images, the studies had set out to determine what "associations come to mind" in American Indian high school and college students when confronted with such imagery. The studies revealed that "American Indian mascot representations are not always regarded as negative." Fryberg, *Of Warrior Chiefs and Indian Princesses*, 30 Basic & Applied Soc. Psychol. at 212.

associations produced the adverse psychological consequences listed above. *See id.*

Further, studies show that stereotypes negatively affect even stereotyped individuals who do not give credence to the stereotypes. *See* Fryberg, *We're Honoring You Dude* at 12 ("Stereotype threat research also demonstrates that negative stereotypes detrimentally affect the stereotyped individuals, *even when the individuals do not consciously believe the stereotypes*."). One likely reason American Indian sports mascots are harmful even when the stereotyped individual does not believe the stereotype, or even when the mascot invokes positive associations in the stereotyped individual, is that they dehumanize American Indians to some extent by reducing them to a symbol or an isolated image. *See* Fryberg, *Of Warrior Chiefs and Indian Princesses*, 30 Basic & Applied Soc. Psychol. at 216. These isolated images remind American Indians of the limited ways in which others view them. *See id.*

Finally, repeated exposure to the limitations implied by stereotypes may cause long-term harm to Indian culture. Studies show that repeated exposure to negative stereotypes leads members of the target groupt to "disidentify" with their cultural heritage, in order to maintain a positive self-image, thus depriving them of the positive aspects of cultural group membership. *See generally* Gordon W. Allport, *The Nature of Prejudice* (1954); Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 Am. Psychol. 613 (1997). Identification with one's racial/ethnic group contributes to positive self-regard and buffers the negative effects of perceived discrimination. When individuals cope with stereotyping by disidentifying

with a group, their group identity no longer serves as an important source for self-definition or self-esteem, and no longer provides the positive benefits of group membership. *See generally* Stephanie J. Rowley et al., *The Relationship Between Racial Identity and Self-Esteem in African-American College and High School Students*, 74 J. Personality & Soc. Psychol. 715 (1998). Thus, American Indian sports mascots may cause both short- and long-term harm to American Indians and their culture.

3. American Indian sports mascots are disparaging because they perpetuate and provide cultural justification for existing inequities and discrimination

At a broad level, support for the Redskins trademark conveys the message that American culture accepts and approves of this limited, stereotyped representation of American Indians. This cultural acceptance benefits those on the top of the social hierarchy by justifying their position and the circumstances that led them to acquire their power. *See generally* John T. Jost & Mahzarin R. Banaji, *The Role of Stereotyping in System Justification and the Production of False Consciousness*, 33 Brit. J. Soc. Psychol. 1 (1994). The stereotypes conveyed by the Redskins trademark provide three psychological benefits to non-Natives: ego justification, whereby people affirm their self-esteem and social position; group justification, whereby the stereotypes justify the actions of their group, particularly toward out-groups; and system justification, whereby the stereotypes serve to justify the existing social institutions and hierarchical structure. *See generally* Christian S. Crandall & Amy Eshleman, *A Justification-Suppression Model of the Expression and Experience*

of Prejudice, 129 Psychol. Bull. 414 (2003). Thus, the Redskins trademark legitimizes an unfair or inequitable treatment of American Indians by creating beliefs about why they deserve their status.

Justifications also allow a person to express an otherwise suppressed prejudice by protecting a sense of egalitarianism and a non-prejudiced self-image. *See id.* For example, embracing the Redskins trademark as an honorific may justify disparagement of American Indians by granting "legitimacy credits." Legitimacy credits are vivid and easily remembered examples of previous non-prejudiced behavior, which can be called upon to offset a subsequent act of prejudice. *See generally* Donald G. Dutton & Vicki Lea Lennox, *Effect of Prior "Token" Compliance on Subsequent Interracial Behavior*, 29 J. Personality & Soc. Psychol. 65 (1976). Legitimacy credits can emerge from showing favor to groups toward which one is prejudiced or holds negative stereotypes. People believe they earn legitimacy credits when they perform egalitarian behaviors that seem to favor a disadvantaged group. But, ironically, once they believe they have earned an egalitarian legitimacy credit, people then feel licensed to behave in a more discriminatory manner. *See generally* Benoît Monin & Dale T. Miller, *Moral Credentials and the Expression of Prejudice*, 81 J. Personality & Soc. Psychol. 33 (2001). If support for the Redskins trademark is perceived as "honoring" American Indians, then supporters can believe they have earned legitimacy credits, which makes them more likely to exhibit discriminatory behavior toward American Indians in the future.[6]

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[6] These impacts are corroborated by studies that demonstrate that exposure to sports mascots like the Redskins provides a

IV. THE PUBLIC'S INTEREST IN THE CANCELLATION OF THE REDSKINS TRADEMARK IS ENHANCED BY THE PERVASIVE NATURE OF THE MARK

The popularity of professional football ensures that the Redskins mascot will be a pervasive aspect of popular culture. Baseball may be America's pastime, but the NFL is "the most popular" professional sports league in the United States. Frank P. Jozsa, Jr., *American Sports Empire: How the Leagues Breed Success* 32 (2003) ("Jozsa, *American Sports Empire*"). Indeed, the most recent Super Bowl had an average viewership of 98.7 million people, making it "the second most watched television program of all time." Ross C. Paolino, *Upon Further Review: How NFL Network Is Violating the Sherman Act*, 16 Sports Law. J. 1, 2 (2009). And a typical nationally televised regular-season NFL game in recent years draws somewhere between 10 and 20 million viewers. *See* Anthony Crupi, *Early ESPN, NBC NFL Ratings Sag*, MediaWeek, Sept. 24, 2007, at 4 (comparing Sunday and Monday night football game viewership numbers for the beginning of the 2007-08 season with the numbers from years past).

As a consequence of the popularity of the sport, the teams and their mascots enjoy widespread public exposure. In the 2005 season, an average of 89,625 fans attended each of the Redskins' eight home games. *See* Josh Drobnyk, *Redskins Success Kicks*

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psychological boost to members of the majority population. *See* Fryberg, *Of Warrior Chiefs and Indian Princesses*, 30 Basic & Applied Soc. Psychol. at 216 ("[t]wo studies revealed that after exposure to various American Indian representations, European Americans reported higher self-esteem compared to the control condition and to a nonnative mascot").

Up Ticket, Merchandise Sales, Wash. Bus. J., Jan. 20, 2006, *available at* http://washington.bizjournals.com/washington/stories/2006/01/23/story2.html. Moreover, the Redskins take their mascot on the road: during the 2009 season, the Redskins will play teams in New York, Detroit, Charlotte, Philadelphia, Atlanta, Dallas, Oakland, and San Diego. *See generally* Jason Reid, *Redskins Open with Giants, Close on Road*, Wash. Post, Apr. 15, 2009, at D1 (reporting on the upcoming season's schedule of games). Those games attract large crowds around the country, subjecting the public to widespread exposure to the Redskins mascot. Finally, many of the Redskins games are televised, allowing the mascot to reach many of the largest media markets in the country. *See* Anthony Crupi, *Early ESPN, NBC NFL Ratings Sag*, MediaWeek, Sept. 24, 2007, at 4 ("a clash between NFC East rivals Washington and Philadelphia, drew 11.6 million viewers on Sept. 17"); *see also* Jozsa, *American Sports Empire* at 136, tbl. 5.1 (listing the number of professional sports teams in ranked designated market areas as of 1997).

In addition to direct exposure to the Redskins trademark at games and on television, the public at large is exposed to the mascot and its imagery in several other settings. For example, highlights from Redskins games are played on ESPN, and countless stories are written about the team and its games in sports magazines, newspapers, and blogs. Further, the mascot's image appears in all video games about the NFL. Additionally, the merchandising of the Redskins brand in clothing bearing the mascot's image is a huge industry. *See* Drobnyk, *Redskins Success Kicks Up Ticket, Merchandise Sales*, *supra*

(detailing the percentage changes in Redskins merchandise sales over the span of a few years).

CONCLUSION

For these reasons, the Redskins trademark is a pervasive aspect of popular culture, and the public has a significant interest in resolution of the trademark cancellation petition. Accordingly, the Court should grant the petition for a writ of certiorari and hold that the doctrine of laches is not available to bar the litigation.

Respectfully submitted,

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APPENDIX

Biographical Statements of *Amici Curiae*

Dr. Mahzarin R. Banaji

Dr. Mahzarin R. Banaji is the Richard Clarke Cabot Professor of Social Ethics in the Department of Psychology at Harvard University. Her focus is primarily on mental systems that operate in implicit or unconscious modes, in particular the unconscious nature of self-assessments. Dr. Banaji has received numerous awards for her work, including the Gordon Allport Prize for Intergroup Relations, a Presidential Citation from the American Psychological Association, and the Diener Award for Outstanding Contributions to Social Psychology. She has also served as Secretary of the Association for Psychological Science, on the Board of Scientific Affairs of the American Psychological Association, on the Executive Committee of the Society of Experimental Social Psychology, and is currently President-elect of the Association for Psychological Science.

Dr. Eugene Borgida

Dr. Eugene Borgida is Professor of Psychology and Law, and Morse-Alumni Distinguished Professor of Psychology at the University of Minnesota, Twin Cities. He has served as Chair of the Psychology Department and Associate Dean and Executive Officer of the College of Liberal Arts. Dr. Borgida's research examines the nature and consequences of gender prejudice, stereotyping, and discrimination, as well as a variety of projects in political psychology and at the intersection of social science and law. He represented the American Psychological Association Board of Scientific Affairs on the Social Science Research Council's Board of Directors and served on the Board

of Directors of the Association for Psychological Science. He is a Fellow of several American Psychological Association Divisions and currently serves as President of Society for Psychological Study of Social Issues (Division 9). Dr. Borgida has received numerous awards for his work, including the Gordon Allport Intergroup Relations Prize and the Heinz Eulau Award from the American Political Science Association for his research on gender prejudice and political psychology.

Dr. Nancy Cantor

Dr. Nancy Cantor is a Distinguished Professor of Psychology and Women's Studies at Syracuse University. She is recognized for her scholarly contributions to the understanding of how individuals perceive and think about their social world and how they regulate their behavior to adapt to life's most challenging social environments. Dr. Cantor has received many awards, including the Distinguished Scientific Award for an Early Career Contribution to Psychology from the American Psychological Association, the Making a Difference for Women Award from the National Council for Research on Women, the Frank W. Hale, Jr. Diversity Leadership Award from the National Association of Diversity Officers in Higher Education, and the 2008 Carnegie Corporation Academic Leadership Award. She is also a fellow of the American Academy of Arts and Sciences and a member of the Institute of Medicine of the National Academy of Sciences and the National Academies Roundtable on Science and Technology for Sustainability. Dr. Cantor is the past chair of the board of directors of the American Association for Higher Education and the board of the American Council on Education, and currently serves on the board of the

American Institutes for Research, the Board of the Commission on Independent Colleges and Universities, among others, and is an Honorary Trustee of the American Psychological Foundation.

Dr. John F. Dovidio

Dr. John F. Dovidio is a Professor of Psychology at Yale University. His research focuses on stereotyping, prejudice, and discrimination. Dr. Dovidio served as Editor of the Journal of Personality and Social Psychology – Interpersonal Relations and Group Processes and has co-authored several books. He has served as President of the Society for the Psychological Study of Social Issues, President of the Society for Personality and Social Psychology, and Chair of the Executive Committee of the Society for Experimental Social Psychology. Dr. Dovidio has received numerous awards for his work, including the Gordon Allport Intergroup Relations Prize and the Kurt Lewin Award for his career contributions to the study of prejudice and discrimination.

Dr. Susan T. Fiske

Dr. Susan T. Fiske is the Eugene Higgins Professor of Psychology at Princeton University. She has written more than 200 articles and chapters, as well as edited many books and journal special issues. Dr. Fiske's research focuses on emotional prejudices at cultural, interpersonal, and neural levels. The U.S. Supreme Court, in a 1989 landmark decision on gender bias, cited her expert testimony in discrimination cases. Dr. Fiske has won numerous awards, including a Guggenheim Fellowship and the American Psychological Association's Early Career Award for Distinguished Contributions to Psychology in the Public Interest. Dr. Fiske has been elected President of the

Association for Psychological Science, President of the Foundation for the Advancement of Behavioral and Brain Sciences, and President of the Society for Personality and Social Psychology.

Dr. Stephanie A. Fryberg

Dr. Stephanie A. Fryberg is an Assistant Professor in the Department of Psychology and Affiliate Faculty in American Indian Studies at the University of Arizona. Dr. Fryberg research on how social representations of race and ethnicity influence psychological well-being has made her an expert on how identities are shaped by social and cultural contexts. She has authored numerous articles and chapters, and her current work includes research on the psychological consequences of using Native American mascots. In 2007, Dr. Fryberg was the recipient of the Society for the Psychological Study of Social Issues (SPSSI) Louise Kidder Early Career Award and the University of Arizona Five Star Faculty Award for excellence in undergraduate education.

Dr. James S. Jackson

Dr. James S. Jackson is the Daniel Katz Distinguished University Professor of Psychology, Professor of Health Behavior and Health Education, School of Public Health, and Director of the Institute for Social Research at the University of Michigan. His research focuses on issues of racial and ethnic influences on life-course development and social support among blacks in the Diaspora. Dr. Jackson is the past Director of the Center for Afroamerican and African Studies and past President of the Black Students Psychological Association and the Association of Black Psychologists. Additionally, Dr. Jackson serves

on several Boards for the National Research Council and the National Academies of Science.

Dr. Hazel Rose Markus

Dr. Hazel Rose Markus is the Davis-Brack Professor in the Behavioral Sciences at Stanford University. She is the author of more than 100 publications on the role of self in regulating behavior and on the ways in which the self is shaped by the social world. In experimental and survey studies, she has studied how the self is grounded in cultural and social contexts, while in her theoretical work she has urged psychology to understand its individualistic focus on human behavior and expand this focus to consider other models. She was elected to the American Academy of Arts and Sciences in 1994 and received the American Psychological Association's award for Distinguished Scientific Contribution in 2008. She has served as director of Stanford's Research Center for Comparative Studies in Race and Ethnicity and past President of Society for Personality and Social Psychology.

Dr. Denise Sekaquaptewa

Dr. Denise Sekaquaptewa is an Associate Professor of Psychology, Faculty Associate at the Research Center for Group Dynamics at the Institute for Social Research, and the Psychology Honors Program Director at the University of Michigan. Her research focuses on stereotyping and intergroup dynamics, in particular the ways in which implicit stereotyping and stereotype threat influence intergroup interactions and individual performance. Dr. Sekaquaptewa has served as a fellow at the National Center for Institutional Diversity and as Council Member of the Society for the Psychological Study of Social

Issues. She is currently Associate Editor of Cultural Diversity and Ethnic Minority Psychology, Consulting Editor of Personality and Social Psychology Bulletin, and is incoming Chair of the Diversity and Climate Committee for the Society for Personality and Social Psychology.

Dr. Robert M. Sellers

Dr. Robert Sellers is a Professor and the Associate Chair of the Department of Psychology, and a Research Associate at the Institute for Social Research at the University of Michigan. His primary research activities focus on the significance that African Americans attribute to racial ethnic identity in their lives, and he has published extensively on this subject. Dr. Sellers serves as President of the Society for the Psychological Study of Ethnic Minority Issues (Division 45 of the American Psychological Association) and is the co-founder of the Center of the Study of Black Youth in Context, funded by the National Science Foundation.

Dr. Claude M. Steele

Dr. Claude M. Steele is a Professor of Psychology at Columbia University. His research focuses on the experience of threats to the self and the consequences of those threats. Dr. Steele has received numerous awards, including the American Psychological Association Senior Award for Distinguished Contributions to Psychology in the Public Interest, the American Psychological Society William James Fellow Award for Distinguished Scientific Career Contribution, the Gordon Allport Prize in Social Psychology, the Kurt Lewin Memorial Award, and the Donald Campbell Award from the Society for Personality and Social Psychology. He has also been elected to the National

Academy of Sciences, the National Academy of Education, the American Academy of Arts and Sciences, and the American Philosophical Society. He has served as President of the Society for the Psychological Study of Social Issues, President of the Society for Personality and Social Psychology, and Chair of the Executive Committee of the Society for Experimental Social Psychology. Dr. Steele is recognized as a leader in the field of social psychology for his commitment to the systematic application of social science to problems of major societal significance.

Dr. Jeff Stone

Dr. Jeff Stone is an Associate Professor in the Department of Psychology and a Research Associate in the Arizona Cancer Center at the University of Arizona. His research focuses on attitudes and persuasion, and on the causes and consequences of racial and gender stereotypes for sports and intergroup relations. Dr. Stone has authored numerous articles and book chapters on these topics. He has also served as Associate Editor for the Journal of Experimental Social Psychology and Consulting Editor for Basic and Applied Social Psychology.

Dr. Michael Zárate

Dr. Michael Zárate is a Professor of Psychology at the University of Texas at El Paso. His primary research focuses on models of assimilation and multiculturalism and on the psychological processes involved in developing and maintaining group identities. The second line of research concerns the development of a neurological model of social perception. Dr. Zárate's is a leader in these fields and is widely published, in top journals, in these areas. He has served on the Editorial boards of Journal of Personal-

ity and Social Psychology and on the Personality and Social Psychology Bulletin, and serves as a reviewer for both the National Science Foundation and the National Institutes of Health. He recently served as Associate Editor of the journal Cultural Diversity and Ethnic Minority Psychology and is currently the Incoming Editor in Chief.